United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

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75-1248

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To be argued by
Irwin Klein.

United States Court of Appeals

For the Second Circuit.

UNITED STATES OF AMERICA,
Appellee,

against

JOSEPH GENTILE and ERNEST LaPONZINA,
Defendants-Appellants.

BRIEF FOR APPELLANTS.

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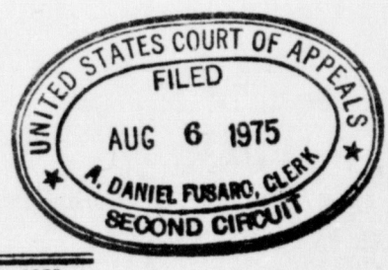

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BRIEF FOR APPELLANTS

Statutes

18 U.S.C. 2

(a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.

(b) Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal.

18 U.S.C. 201.

(a) For the purpose of this section:

"public official" means Member of Congress, the Delegate from the District of Columbia, or Resident Commissioner, either before or after he has qualified, or an officer or employee or person acting for or on behalf of the United States, or any department, agency or branch of Government thereof, including the District of Columbia, in any official function, under or by authority of any such department, agency, or branch of Government or a juror; and

"person who has been selected to be a public official" means any person who has been nominated or appointed to be a public official, or has been officially informed that he will be so nominated or appointed; and

"official act" means any decision or action on any question, matter, cause, suit, proceeding or controversy, which may at any time be pending, or which may by law be brought before any public official, in his official capacity, or in his place of trust or profit.

(b) Whoever, directly or indirectly, corruptly gives, offers or promises anything of value to any public official or person who has been selected to be a public official, or offers or promises any public official or any person who has been selected to be a public official to give anything of value to any other person or entity, with intent—

(1) to influence any official act; or

(2) to influence such public official or person who has been selected to be a public official to commit or aid in committing, or collude in, or allow, any fraud, or make opportunity for the commission of any fraud, on the United States; or

(3) to induce such public official or such person who has been selected to be a public official to do or omit to do any act in violation of his lawful duty, or

18 U.S.C. 371

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor.

Constitutional Amendments

Amendment [V]

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Amendment [VI]

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining Witnesses in his favor, and to have the Assistance of Counsel for his defence.

AMENDMENT [VIII.]

Excessive bail, fines, punishments

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

ISSUES

1. Did the trial judge err in declaring a mistrial as to appellant La Ponzina when the prosecutor improperly anticipated appellant Gentile's defense of entrapment in opening to the first jury, and as a result thereof was La Ponzina placed in double jeopardy by the second trial?

2. Did the trial judge err in continuing to participate in the trial, while he himself was under disciplinary proceedings, in disregard of the suggestion to remove himself from finding criminal cases until the completion of his disciplinary proceedings?

3. Did the trial judge err in admitting incriminatory statements of appellants, despite the fact that they were not advised of their rights as required by I.R.S. regulations?

4. Did the prejudicial remarks of the prosecutor deprive appellants of a fair trial?

5. Did the judge err in improperly invading the secrecy of the jury by submitting to them an unrequested exhibit while they were deliberating?

6. Was there sufficient evidence of participation by La Ponzina?

7. Did the judge err in permitting Gentile's character to be attacked on the government's main case?

STATEMENT OF THE CASE

Appellant Gentile was charged in the first two counts of the Indictment with offering and giving a bribe to an I.R.S. Special Agent in connection with his own income tax returns, in violation of 18 USC 201 (b) (1), (2) and (3). (5a)

Both appellants were charged in Counts Three and Four with bribery and conspiracy to bribe the agent in connection with the income tax returns of appellant La Ponzina. (5a, 7a)

Appellant Gentile was found guilty of all counts and appellant La Ponzina was found guilty of Counts Three and Four, after a jury trial in the Eastern District of New York before Honorable MARK A. CONSTANTINO.

Thereafter, appellants moved to set aside such verdicts. (543a, 545a)

While the judge was pondering the decision thereon, he was called before this tribunal in disciplinary proceedings to answer charges accusing him of improper conduct and being friendly and associating with attorneys in criminal cases pending before him.

It was suggested that the judge disqualify himself from

presiding over criminal trials pending the outcome of his own disciplinary proceedings. He refused to do so and continued to participate in this case.

Eventually, he was cleared of the charges against him. Incidentally, this was the second time that charges had been made against the judge.

Shortly thereafter, the motions were denied and sentences imposed. (548a, 568a)

Appellant Gentile was sentenced to a prison term of four (4) years and a fine of $5,000.00. (604a)

Appellant La Ponzina received a split sentence of six (6) months in a community treatment center and lengthy probation period thereafter. (605a)

Appellants appeal from such judgments of conviction. (606a, 608a)

Appellants are at liberty on bail pending the determination of this appeal.

These cases were part of a group of cases involving the attempted corruption of I.R.S. agents, emanating from an allegedly corrupt agent named Braverman.

Appellant Gentile's sentence was by far, the most severe thereof.

The case against the appellants was made by I.R.S. Special Agent Tsotsos, who, armed with a body transmitter, engaged

the appellants in recorded and guided conversations; first Gentile, then La Ponzina. Even the very first meetings with each were taped. (144a, 213a)

Gentile repeatedly told the agent to "do your job" and "do your duty" in response to leading suggestions made by the agent. (148a, 158a, 189a) He so instructed the agent at least fifteen (15) to twenty (20) times. (149a) Eventually, after first telling Gentile that he wanted to help him and not recommend criminal prosecution (69a), the agent, for the first time, brought up the subject of money (70a-77a, 201a, 203a, 206a), to which Gentile acquiesced.

Thereafter, Gentile became loquacious and made incriminating statements as to other acts. (93a, 104a, 105a)

The agent then requested Gentile to introduce him to La Ponzina, stating that he was also checking La Ponzina's returns, although he had no case on him. (79a, 97a) Gentile allegedly paid the agent $1,000.00 to take care of La Ponzina's returns, (249a, 255a) but not in the presence of La Ponzina.

Gentile introduced the agent to La Ponzina and they talked about golf generally, and La Ponzina suggested a driving range where the agent could obtain some lessons. (124a, 131a, 132a) The agent testified that La Ponzina rubbed his thumb and forefinger together (233a), but this did not appear on the tapes (225a), nor in any report. (233a, 238a, 239a)

The agent also testified that La Ponzina had "whispered" to him (233a), but this did not appear on the tapes (227a, 228a, 231a, 232a) nor in any report. (233a, 238a, 239a)

At the prosecutor's suggestion, the agent testified that he had testified before the grand jury that La Ponzina had whispered to him. (350a) However, in cross-examination, when confronted with the transcript of his grand jury testimony, the agent admitted he did not use the word "whisper" before the grand jury (359a-363a), and that his affirmative answer with respect thereto was incorrect. (362a, 363a)

Significantly, the agent failed to produce any daily reports of the dates involving the purported "gesture" and "whisper", although reports were produced for all other dates.

In summation, defense counsel accused the prosecutor of having suggested a false answer to the witness and in failing to come forward and disclose that the word "whisper" was not in the grand jury transcript. (367a) Specifically, it was remarked that the prosecutor, by name, had "jam" on his face by reason of such prosecutorial misconduct. (461a, 462a)

The prosecutor's summation stated in effect that if such accusation was made of him, whether it also applied to other members of the prosecutorial staff (against whom such remark was not directed). (464a, 465a)

Only Gentile could have used the defense of entrapment,

since mostly all of the agent's conversations were with him. La Ponzina did not have such a defense, inasmuch as the alleged bribe was not paid by him. (249a, 255a)

Initially, the prosecutor's opening statement before the first jury anticipated such a defense of entrapment by Gentile and pointed out the facts of Gentile's prior disposition. (11a, 12a)

Gentile's attorney moved for a mistrial. (13a) The judge ruled that the opening was improper and prejudicial. (13a-17a) The judge asked counsel for La Ponzina if La Ponzina wished to join in the motion (18a), which La Ponzina's counsel refused, stating that he had no standing, inasmuch as the defense of entrapment was not available to him. (19a-21a) Nevertheless, the judge granted the mistrial (25a) and acknowledged that La Ponzina did not join in the motion. (30a) La Ponzina's counsel participated to the extent of making one or two suggestions to the judge in behalf of Gentile, while Gentile's attorney argued the motion. (29a)

La Ponzina then moved for a dismissal of the indictment upon the grounds of double jeopardy, which was denied. (22a, 43a-45a)

During their deliberations, the jurors asked to hear the tape containing the $1,000.00 bribe and free golf lessons. (525a-533a)

The only such tape was the tape of August 8, 1972.

The judge gratuitously also played the tape of August 3,

1972, over strenuous objection, although not requested by the jury. (532a)

The August 8th tape, standing by itself, is hardly incriminatory. It is a recording of a conversation between the agent and La Ponzina.

The government, in its main case, attacked Gentile's character, by introduction of prior unrelated acts and crimes. (47a, 82a, 107a, 108a, 243a, 294a, 542a, 251a, 293a, 408a,470a,499a)

I.R.S. regulations provide for a reading of a taxpayer's rights upon initial interview by a Special Agent. (534a) Gentile was not advised that he could have a lawyer present (161a, 162a), and La Ponzina was not advised of his rights at all, (215a, 219a) and the agent admitted that he flouted the regulations. (219a)

POINT I

THE DECLARATION OF A MISTRIAL UPON MOTION MADE BY APPELLANT GENTILE, IN WHICH APPELLANT LA PONZINA REFUSED TO JOIN AND HAD NO STANDING, AFTER JEOPARDY HAD ATTACHED, BARRED THE RETRIAL OF LA PONZINA BEFORE THE NEWLY SELECTED JURY.

There were two separate trials which were tried jointly. La Ponzina was not involved in Counts One and Two, which pertained solely to Gentile.

The defense of entrapment was only available to Gentile and then only as to Counts One and Two. Such defense of entrapment

was not available to La Ponzina.

After the jury had been sworn and seated and, during the Government's opening statement, (11a, 12a) the prosecutor made improper statements which anticipated the co-defendant's defense of entrapment. (11a, 12a) Gentile moved for a mistrial. (13a) La Ponzina did not join in the motion, but his counsel merely addressed the court in support of the motion made in behalf of Gentile. (29a) After first asking La Ponzina's counsel whether he wished to join in the motion made by Gentile and after La Ponzina's counsel stated that he did not join in such motion, nevertheless the trial judge declared a mistrial as to both appellants, over the objection of counsel for La Ponzina. The judge acknowledged that La Ponzina did not join in the motion. (30a)

In the instant case, there is no indication that the trial judge gave any thought at all to La Ponzina's "valued right" to have the original jury hear and decide his case. Nothing appears to show, in the words of United States v. Jorn, 900 U.S. 470 (1971), that the judge took care to assure himself that the situation warranted foreclosing La Ponzina from a potentially favorable judgment. "There was no manifest necessity here for depriving" La Ponzina of his original tribunal; hence the double jeopardy bar will prevent a new trial.

La Ponzina had a strong interest and a valued right in having the original jury hear and decide the question of his guilt.

and this right will not be taken away lightly.

On these facts, insofar as La Ponzina is concerned, no manifest necessity is readily apparent and the trial judge's exercise of discretion failed to meet the standard of "manifest necessity" and "public justice" insofar as La Ponzina is concerned; hence, the right to be free from double jeopardy bars a new trial for La Ponzina.

Jeopardy had already attached when the prosecutor delivered his improper opening statement. By anticipating the defense of entrapment asserted by Gentile, the prosecutor deprived La Ponzina of his Fifth Amendment rights.

La Ponzina had no standing upon the motion made by Gentile, inasmuch as the defense of entrapment was not available to him and in response to the inquiry of the judge, he stated that he did not join in such motion (18a,19a) and the judge acknowledged this. (29a, 30a)

The posing of such question by the court implies that the court was aware that jeopardy had already attached and that the declaration of a mistrial as to La Ponzina would constitute double jeopardy and bar a new trial, unless La Ponzina joined in the motion. Then, of course, double jeopardy would have been averted.

In United States v. Perez, 22 U.S. (9 Wheat.) 579 (1824), the Supreme Court laid down the standard for the double jeopardy bar:

> ". . .the law has invested Courts of justice with the authority to discharge a jury from giving any verdict, whenever, in their opinion, taking all the circumstances into consideration, there is a manifest necessity for the act, or the ends of public justice would otherwise be defeated.
>
> * * *
>
> To be sure, the power ought to be used with the greatest caution, under urgent circumstances, and for very plain and obvious causes;. . ."

La Ponzina's valued right to have the original jury decide his case requires manifest necessity to be set aside. Clearly the leading case is United States v. Jorn, 400 U.S. 470 (1971). There, the defendant therein was charged with assisting the preparation of the fraudulent income tax returns of five taxpayers, who were all called as prosecution witnesses. When the first one was called by the Government, the attorney for the defendant suggested the witness be apprised of his rights. The trial judge was not satisfied that any of the witnesses had been adequately advised of their constitutional rights and discontinued the trial over the objection of the defendant. The Supreme Court held that double jeopardy barred retrial and reaffirmed that a sound exercise of discretion must clearly appear to prevent the double jeopardy bar. In that case, said the Supreme Court, the trial judge did not exercise deliberate and sound discretion when he weighed against the importance of the defendant's right to have the original jury decide his case. The Court continued:

> "In the absence of such a motion, (for mistrial), the Perez doctrine of manifest necessity stands as a command to trial judges not to foreclose the defendant's option until a scrupulous exercise of judicial discretion leads to the conclusion that the ends of public justice would not be served by a continuation of the proceedings."

Jorn is of particular relevance to the instant case since there, as here, La Ponzina's attorney merely made one or two suggestions in the side bar discussion in behalf of Gentile. Nevertheless, such contribution by counsel was not interpreted as consent on the part of the defendant. (29a,30a)

The effect of the Jorn decision is discussed in United States v. Walden, 448 F. 2d 925 (4th Cir. 1971).

POINT II

THE REFUSAL OF THE TRIAL JUDGE TO ADHERE TO THE SUGGESTION OF THIS COURT THAT HE DISQUALIFY HIMSELF FROM PRESIDING OVER CRIMINAL TRIALS, PENDING THE OUTCOME OF HIS OWN DISCIPLINARY PROCEEDINGS, DEPRIVED APPELLANTS OF DUE PROCESS OF LAW.

We do not intend to be presumptuous or impertinent nor to mount any personal attack upon the trial judge, who we hold in the highest esteem. In our opinion, the trial judge herein was a most compassionate, humane and highly sensitive individual who was subjected to the intense personal pressure of disciplinary

proceedings in the midst of the appellants' case.

However, judges, like the rest of us mortals, are mere men and as such, subject to the same pressures and traumas.

Small wonder then, that he felt the impact and thrust of his own personal disciplinary proceedings before this tribunal, while he was still pondering the fate of the appellants, whose criminal case was still pending before him.

This court is sufficiently sophisticated to have realized the extent thereof, when the significant suggestion was made to the trial judge to disqualify himself from criminal trials pending the outcome of his pending disciplinary proceedings. Alas, he refused such suggestion and continued to participate in this case; but to the prejudice and detriment of the appellants.

All that a criminal defendant can ask of a judge is the fair and impartial exercise of judicial discretion. Appellants contend that they were deprived thereof and denied due process. The judge subconsciously, unintentionally and unwittingly diluted the dispensation of justice and exercise of judicial discretion, by first thinking in terms of himself, prior to considering the plight of appellants. Stated otherwise, appellants contend that such judge became more concerned with protecting, defending and preserving his own personal image and in attempting to curry favor with and in pleasing this court, than with protecting the rights of the appellants to receive the fair dispensation of justice.

After all, this was not the first judicial inquiry into the conduct of the judge. Significantly, this judicial inquiry probed the judge's relationships with persons of the same ethnic background as the judge who allegedly were members of organized crime. Significantly, these appellants are also of the same ethnic background and according to the raw, unscreened and undiluted hearsay material contained in the "confidential" (sic) pre-sentence probation reports, allegedly were also members of organized crime. Of course, this allegation has been vehemently denied by the appellants. (568a, 578a, 580a, 588a, 589a, 594a-600a 603a)

In other words, the appellants standing before him personified and symbolized the very same type of persons toward whom he was accused of being too lenient and friendly. This then, was the ideal showcase and setting for him to demonstrate the falsity of such charges, by denying their motions to set aside the verdicts and imposing harsh and excessive sentences. The real issue, psychological though it may be, is how much personal stress can a judge withstand without having his ability to properly exercise judicial discretion objectively, impaired thereby. Stated in other words -- at what point will his personal considerations surface and interfere with his judicial discretion?

In McCartney v. Commission on Judicial Qualifications, 12 Cal. 3d 512, 526 P. 2d 268 (1974), the court remarked:

"A judge must not. . .place the defense

> of his own character above his obligation to promote respect for the law."

In Ungar v. Sarafite, 376 U.S. 575 (1964), the Supreme Court stated:

> "In making this ultimate judgment the inquiry must be not only whether there was actual bias on respondent's part, but also whether there was 'such a likelihood of bias or an appearance of bias that the judge was unable to hold the balance between vindicating the interests of the court and the interests of the accused.'"

A criminal defendant is entitled to an impartial and impartial-appearing court. In Wall v. American Optometric Associations, Inc., 379 F. Supp. 175 (N.D. Ga. 1974), aff'd, 95 S. Ct. 166 (1974), certain guidelines were set forth:

> "A fair and impartial tribunal requires at least that the trier of fact be disinterested. . .and that he also be free from any form of bias or predisposition regarding the outcome of the case. . . . Not only must the procedure be fair, 'the very appearance of complete fairness' must also be present."

A judge should abstain from performing or taking part in any judicial act in which his personal interests are involved, and he may not sit in judgment where, from interest or any other cause, he could not be legally indifferent between the parties.

It is to the interest of all concerned that no defendant be improperly convicted or sentenced because a judge subconsciously submits to pressures exerted against him by reason of his own

conduct.

Appellants contend that the judge could not have impartially decided the motions to set aside the jury verdicts or imposed impartial sentences because the judge's own personal disciplinary difficulties must have been foremost in his mind and he must have been inclined to "bend backwards" in order to please and pacify this tribunal and at the same time, defend and protect his own image. As a result thereof, the appellants' rights must have been subordinated to the personal concerns of the judge, or at the very least, it would seem to appear so.

The facts at bar clearly disclose the existence of what appears to be an objectionable inclination on the part of the judge that gives "fair support to the charge of a bent of mind that may prevent or impede impartiality of judgment". Berger v. United States, 255 U.S. 22 (1921).

The Supreme Court has demonstrated a sensitivity to the question of when a judge should not be allowed to preside over a particular case. Taylor v. Hayes, 418 U.S. 488 (1974); In re Murchison, 349 U.S. 133 (1955); Tumey v. Ohio, 273 U.S. 510 (1927).

The feeling persists that appellants have been punished for someone else's sins.

By denying the motions to set aside and imposing the harsh sentences, the judge, as a result of his own personal problems, assumed the role of the prosecution rather than remaining

impartial.

The circumstances and conditions surrounding this case are of such nature that they might cast doubt and question as to the fairness or impartiality of any judgment the trial judge may have pronounced; hence such judge, even though he may not have been conscious of any bias or prejudice, should have disqualified himself. It is the duty of the court to maintain and safeguard the right of trial by a fair and impartial tribunal and to be vigilant in seeing to it that every possible semblance of reasonable doubt or suspicion on that question is removed and eliminated to the end that justice may be properly administered.

Appellants contend that, absent any indication whether the trial judge was specifically questioned as to the status of this pending case in the course of his own disciplinary proceedings, the circumstances display as direct an impact upon the judge's impartial discretionary ability as is possible.

Even if there is no actual and direct showing that the judge was improperly influenced in this case as a result of his own personal difficulties, the very appearance of justice demands reconsideration of the motions and re-sentencing by a judge who is known to be impartial.

There is a serious disparity in sentences on conviction from the Braverman I.R.S. corruption, with Gentile's sentence the

most severe.* Even La Ponzina's half-way house confinement was for the maximum period under 18 USC 3651.

This contention is highlighted and buttressed by the subconscious pressures to which the judge was subjected by his own disciplinary proceedings.

In the recent case of United States v. Del Toro and Kaufman, 74-2021, 2035, decided February 27, 1975, this Court stated:

> "We have noted Kaufman's argument that there is a serious disparity in sentences on convictions from Model Cities corruption, with Kaufman's sentence by far the most severe. We do not exercise appellate review on the sentencing judge's discretion, but we call the judge's attention, not only to the reversal of the substantive counts, but also to the disparity, for his consideration if a Rule 35 motion is made."

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* Braverman, 73 Cr. 572 - 1 year, suspended, 5 years probation.
Finamore, 73 Cr. 1001 - 1 year, suspended, $7,500 fine, 6 months.
Catalo, " - unsupervised probation.
Eolu Constr. Co. " - unsupervised probation.
Lucian Homes, Inc." - $2,500 fine.
Frautone Homes, Inc. "- $2,500 fine.
Marcone, 72 Cr. 1231 - 6 months.

POINT III

APPELLANTS WERE DEPRIVED OF THEIR CONSTITUTIONAL RIGHT AGAINST SELF-INCRIMINATION AND DENIED DUE PROCESS BECAUSE OF THE REFUSAL AND FAILURE OF THIS COURT TO SUPPRESS THEIR INCRIMINATORY STATEMENTS, DECLARATIONS AND ADMISSIONS UPON THE GROUNDS THAT THE SPECIAL AGENT FAILED AND REFUSED TO ADVISE THEM OF THEIR RIGHTS AS REQUIRED BY INTERNAL REVENUE SERVICE REGULATIONS.

The regulations of the Internal Revenue Service in effect at the date of the alleged act required every Special Agent to advise taxpayers of their Fifth Amendment rights in any non-custodial interview. (539a)

A Special Agent is a member of the Bureau of Intelligence of the Treasury. When a Special Agent gives the interview, the interview changes from one that is investigative to one that is accusatory. When it is accusatory, the taxpayer has to be given his rights. If the interview is given by a Special Agent, the taxpayer must be given his rights. If not, anything determined in the interview must be excluded.

Here, the Special Agent admitted that he refused and failed to advise La Ponzina of his rights and Gentile of his right to have his lawyer present. Accordingly, any statements by the appellants should be excluded and suppressed. It is generally held on the authority of United States ex rel Accardi v. Schaughnessy,

347 U.S. 260 (1954), that where an agency of the Government does not observe the rules, regulations or procedures which it has established, the due process clause of the Fifth Amendment has been violated.

When the procedure prescribed by the regulation is not followed, evidence so obtained will be suppressed on the grounds that the due process clause of the Fifth Amendment has been violated. United States v. Heffner, 420 F. 2d 809 (4th Cir. 1969); United States v. Leahey, 434 F. 2d 7 (1st Cir. 1970); United States v. Maciel, 351 F. Supp. 817 (D.R.I. 1972).

In Leahey, it was held that it was the court and not the agency that was determining admissibility based on its interpretation of the Fifth Amendment and thereby rebutted the specious rationale the due process clause was not violated because administrative agencies may not dictate preconditions for admissibility of evidence in federal trials.

The Leahey rule was adopted in United States v. Brod, 324 F. Supp. 800 (S.D. Tex. 1971). See also United States v. Phifer, 335 F. Supp. 724 (S.D. Tex. 1972), wherein the courts suppressed evidence obtained where the procedure outlined was not followed.

Inasmuch as this Circuit has not yet ruled on the effect of this particular regulation of the Internal Revenue Service, we request the adoption of the Leahey rule, since the Accardi case

appears to be controlling.

In any event, the judge's charge in this case as to the failure and refusal of the Special Agent to advise the appellants of their rights was woefully inadequate, off-handed and delivered in a cavalier manner to the prejudice of the appellants. (482a)

The jury was merely instructed that they could "consider" the failure to advise the appellants of their rights as prescribed by the regulation. (518a)

Proper request was made therefor, and the failure to charge as so requested constitutes reversible error (Page 35)

Had the appellants been so advised of their rights, they would not have said anything to the Special Agent and thus not have incriminated themselves. They have been deprived of their constitutional right of due process and stripped of the protection against self-incrimination.

The judge charged the jury that they could "consider" the failure of the Special Agent to advise appellants of their rights as prescribed by the regulations of the Internal Revenue Service. The judge should have amplified and explained to the jury the manner in which they could consider such flouting of the regulations as well as the legal significance thereof, as requested. This was of utmost significance, because if the jury had been made aware that they could have disregarded any incriminatory statements made by the appellants which were made without being advised of their

rights, they would have been required to acquit, inasmuch as there was no other inculpatory evidence presented.

POINT IV

THE PROSECUTOR'S REMARKS SO PREJUDICED THE TRIAL AS TO DENY APPELLANTS DUE PROCESS OF LAW.

In the course of his summation, the prosecutor made serious prejudicial remarks which require a mistrial.

(a) The reference to spreading the "jam" of a poorly conducted prosecution among all the members of the prosecutor's office. (464a, 465a)

The prosecutor improperly placed the integrity of the government upon the scales to buttress the credibility of its witness Tsotsos; nor can the prosecution escape the consequences thereof by claiming that such prosecutorial misconduct was a justifiable response to the remark by defense counsel that the prosecutor had "jam" on his face for suggesting a false answer to his witness and in not disclosing the falsity thereof. (350a, 367a, 461a, 462a)

There was no such attack by defense counsel upon any other member of the government and the prosecutor's attempt to have the jury believe that such personal remark reflected upon the integrity of other members of the prosecution staff was improper

and introduced a new and additional issue into the case, viz.: the integrity of such other members of the prosecutorial staff against whom no such accusation was made.

(b) The suggestion that the recording of the Special Agent's conversation with the defendant was warranted and authorized and that defense counsel did not question such authority. (466a, 467a)

(c) Stating that the defendant Gentile was not being charged with bribery in his prior criminal tax case. (470a)

(d) Unfairly comparing evidence with statements redacted from the taped conversations. (471a)

(e) Statement that what defendant Gentile said "amounts to a walking textbook on how to bribe people. . ." (472a)

In reversing a conviction for conspiracy on the ground of the prosecutor's misconduct, the United States Supreme Court, in Berger v. United States, 295 U.S. 76 (1935), defined the prosecutor's duty to be fair and not to use improper methods.

In the instant case, the prosecutor's remarks were without doubt "foul" blows at the appellants. The prosecutor's conduct here was of such a nature that it would have been impossible to cure its effects by the usual method, which is a strong admonition by the trial judge to the jury to ignore the prejudicial remarks.

The effect of listing all the members of the United

States Attorney's Office, (464a,465a) and the direct accusation of the defendant as "writing the book" on bribery, was so prejudicial that it could not be cured by a mere admonition. 88 C.J.S. Trials, 202.

In United States v. White, 486 F.2d 204 (2d Cir. 1973), this Court commented upon repeated allegations of prosecutorial misconduct which had come before it recently, saying:

> ". . .is not so insignificant that we can ignore it without comment, especially in view of the frequency with which allegations of prosecutorial misconduct have come before this court."

In United States v. Drummond, 481 F. 2d 62 (2d Cir. 1973), this Court reversed a conviction for prosecutorial misconduct which permeated the entire trial, saying:

> "In the present case the prosecutor repeatedly expressed his personal belief in the guilt of appellant; he attempted to use his position as a representative of the United States government to bolster the testimony of government witnesses and to undercut the testimony of the defense witnesses. Again and again he misstated testimony and he persisted in asking irrelevant and argumentative questions. He made improper comments on the evidence and on the witness' testimony."

In Berger, supra, the court noted:

> "(We) have not here a case where the misconduct of the prosecuting attorney was slight or confined to a single instance, but one where such misconduct

> was pronounced and persistent, with a probable cumulative effect upon the jury which cannot be disregarded as inconsequential. A new trial must be awarded."

In the instant case, the cumulative effect of the prosecutor's remarks, the deliberate attempt to misconstrue the "jam" remark, the inclusion of the statement regarding Gentile's arrests and the attempt to associate him with criminal elements, taken together amount to such prosecutorial misconduct and could not have been eradicated by an admonition, if one had been given.

POINT V

> THE JUDGE ERRONEOUSLY INVADED THE PROVINCE OF THE JURY AFTER IT HAD COMMENCED DELIBERATIONS AND INTERFERED THEREWITH BY GRATUITOUSLY SUBMITTING ADDITIONAL MATTER TO THEM, ALTHOUGH NOT REQUESTED BY THEM.

After trial, while the jury was deliberating, they sent a request to the judge stating:

> We would like to hear the tape concerning the $1,000.00 bribe and the golf lessons.

The only tape with both of these items on it was the August 8th tape containing La Ponzina's conversation with the Special Agent. (525a, 533a) Nevertheless, the judge, in responding to the request, gratuitously gave the jury two tapes. In addition to the August 8th tape, which they had requested, he gave

them also the August 3rd tape, not containing La Ponzina's voice, which was sheer hearsay, but which, when played together with the August 8th tape, was devastating to the defense.

Defense counsel objected, arguing that no one is entitled to give anything to a jury during its deliberation, unless the jury requested it. (525a, 527a, 546a)

The court erred in submitting something further (the August 3rd tape) to the jury after the case had been sent to the jury and they were deliberating, in the absence of any request by the jury for such further material.

The discretion of the court to send material to the jury during its deliberation cannot come into play until such a request has first been made by the jury.

In Easley v. United States, 261 F. 2d 277 (Cir. 1958), the Court of Appeals held:

> "We think the granting of the request (that testimony of a prosecution witness be read back) was within the district court's discretion and no abuse of that discretion is shown."

It is important to note that it was the granting of a request which was affirmed in Easley. Logically, therefore, the request must be made before it can be granted, and in the absence of a request, the judge is not free to send material in to the jury sua sponte.

The same principal that the judicial discretion as to

whether to submit additional matter to the jury during its deliberations should not be exercised until a request therefor has first been made by the jury has been followed in this Circuit.

In United States v. Koska, 443 F. 2d 1167 (2d Cir.) cert. denied 404 U.S. 852 (1971), the Court of Appeals emphasized that the jury's request (for copies of tape transcripts) had been explicit, and indicated that only such a specific request could have been granted. The court said:

> ". . .later, in response to an explicit request, (the jury) was allowed to have twelve copies of the transcript during deliberations. . . .No good reason appears for denying a transcript to a jury which has requested it. . . ."

In Koska, in other words, this court affirmed the procedure which had been followed, and strongly emphasized that a request by the jury had been made.

In the instant case, the jury did not request the August 3rd tape, and the trial judge ignored the directive of the Koska opinion when he sent that tape to the jury.

In United States v. Carsons, 464 F. 2d 424 (2d Cir.), cert. denied 409 U.S. 949 (1972), the Court of Appeals commented:

> "(We) hold that it was not an abuse of discretion to admit the tapes and transcripts into evidence nor error to allow the jury to retain the transcripts during the trial and their deliberations." 464 F. 2d at 437 (emphasis added)

Thus, the opinion clearly indicates that the jurors took affirmative action, upon their own initiative, to secure permission to retain the transcripts in their possession during deliberations and that, only after the jurors made their request, did the trial judge "allow" them to "retain" the transcripts.

In United States v. Rosenberg, 195 F. 2d 583 (2d Cir.) cert. denied, 344 U.S. 838, rehearing denied, 344 U.S. 889 (1952), during the jury's deliberations, they requested that a portion of a witness' testimony on direct examination be read back, and the judge granted the request. In the juror's presence, defense counsel asked the court to order the reading of the cross-examination of the same witness. The trial judge refused to do so, unless the jury requested to hear the cross-examination testimony. On appeal, the ruling of the trial judge was upheld, the Court of Appeals saying:

> "We think that the jury understood from the colloquy that the cross would be read if the jurors so desired, and that their silence meant they had no such desire."

In the instant case, the request of the jury was silent concerning the August 3rd tape. This indicates, as the Rosenberg court held, that the jury had no desire to hear that tape. Therefore, the trial court, under the reasoning of Rosenberg, should not have sent material to the jury without its express request.

The judge erroneously pierced the veil of secrecy and

privacy of the deliberations of the jury by violating the above standards set by our Circuit Courts.

POINT VI

THE JURY VERDICT IS CONTRARY TO LAW IN THAT THERE WAS INSUFFICIENT INDEPENDENT EVIDENCE OF LA PONZINA'S ALLEGED KNOWING PARTICIPATION IN THE PURPORTED CRIME TO SUBMIT TO THE JURY.

The trial record is woefully barren of any participation by La Ponzina in the commission of the crime charged.

Merely because he may have been acquainted with or was in the company of Gentile a few times, or because Gentile allegedly offered and paid a bribe in his behalf does not establish any participation by La Ponzina in the crime of bribery, either substantive or conspiratorial.

United States of America v. Stromberg, (2 Cir.). 268 F. 2d 256, this court reversed the conspiracy convictions and dismissed the indictment, stating:

> "As to the appellants Samnick and Danis, we are unable to find evidence which warranted submission to the jury.
>
> * * *
>
> Each, to be sure, was frequently in Aron's office and was frequently entertained.
>
> * * *

> But mere association with conspirators is insufficient basis for a finding of participation. United States v. Di Re, 332 U.S. 581, 68 S. Ct. 222, 92 L. Ed. 210; Aikens v. United States, 98 U. S. App. D. C. 66, 232 F. 2d 66; United States v. Moloney, 7 Cir., 200 F. 2d 344. The only proof which could possibly be considered independent evidence of participation consists of the statements, one by each of these two defendants, made to Lafitte.
>
> * * *
>
> It may seem strange that narcotics conspirators should discuss such techniques at luncheon with friends not members of the conspiracy. But no inference unfavorable to these defendants may be drawn from this fact.
>
> * * *
>
> As to these two defendants, the independent evidence was too slight to warrant the admission of hearsay declarations and too slight to submit to the jury. Their motions for a directed verdict should have been granted."

In the case at bar, there was no participation in the commission of the crime of bribery. There was not even a discussion of any conspiratorial techniques between the appellants. All that is present is mere association with each other and an alleged offer by Gentile in behalf of La Ponzina, without any proof that La Ponzina participated therein.

The indictment should have been dismissed as a matter of law because there is insufficient, if any, proof that La Ponzina

joined and participated in the crime of bribery or that any conspiracy to bribe existed.

There is no proof of any conversation between the co-defendant and defendant pertaining to any bribe in connection with the defendant's income tax returns. (532a, 535a)

There is no proof of any act of participation by La Ponzina.

At best, the evidence discloses that La Ponzina was the third-party beneficiary of an alleged bribe by Gentile.

POINT VII

GENTILE WAS DEPRIVED OF A FAIR TRIAL BY THE INTRODUCTION INTO EVIDENCE OF HIS POSSIBLE PRIOR CRIMINAL ACTIVITY.

United States v. Russell, 411 U.S. 423 (1973), recognized:

> "That the principal element in the defense of entrapment was the defendant's predisposition to commit the crime."

There, the Supreme Court explicitly called for a limited inquiry, when entrapment is the defense, into a defendant's predisposition to commit the crime with which he has been charged.

Although Gentile's defense of entrapment permits the government to introduce evidence that he was predisposed to commit the crime of bribery, such a defense does not invite a broad and

frontal character attack. United States v. Fink, 502 F. 2d 1 (5th Cir. 1974). United States v. McKinley, 493 F. 2d 547 (5th Cir. 1974).

In the present case, however, the proof offered to show predisposition to commit the crime charged is beyond the permitted ambit and at most proves a predisposition to engage in loan sharking or bookmaking.

The evidence which was introduced concerned Gentile's possible involvement in loan sharking or bookmaking activities (83a) in connection with his receipt and negotiation of payroll checks. (82a) Proof of loan sharking or bookmaking or prior arrests do not have any tendency to establish a predisposition to bribe.

Since entrapment was the only defense in the present case, intent, motive, knowledge or design are not issues in this case since they were not raised as a defense by appellant. In other words, only the appellant's predisposition to commit bribery was put in issue by the defense of entrapment.

In United States v. James, 208 F. 2d 124 (2d Cir. 1953), this court applied the rule in Michaelson v. United States, 339 U.S. 469 (1948) and stated:

> "The effect of the introduction of this testimony was too clearly to show a proclivity to commit crime and thus blacken, to his prejudice, the character of the appellant."

The statements of Gentile concerning his prior arrests "do not reveal the nature of the offense" for which Gentile was previously arrested.

In the present case, proof of the defendant's alleged loansharking or bookmaking activities is "colorless" on the issue of his intent to bribe.

The factor emphasized by the James, that the previous acts or crimes must give color to the crime for which the defendant is currently on trial, is reiterated in United States v. Beno, 324 F. 2d 582 (2d Cir. 1963), wherein the defendant was charged with taking a bribe.

The prosecutor's cross-examination of the defendant included inquiry into other prior incidents, but not for bribery.

This court held that none of the other incidents was in any way similar to the crime with which the defendant was on trial, and reversed the conviction. Gentile's involvement in alleged loansharking and bookmaking is "sufficiently distinguishable from" the giving of a bribe as to be inadmissible. The Beno court ruled out the evidence of the defendant's other illegal activities to rebut the defense of entrapment, stating that entrapment

> ". . .has never, so far as we have been able to determine, been interpreted to permit the sweeping free-wheeling and devastating sort of inquiry allowed here."

The agent volunteered that the appellants were "connected" (251a) and that Gentile was closely associated with a notorious character, John "Bath Beach" Oddo. (107a, 108a)

Surely, the contrived dialogue conducted by the agent had no bearing on the crime of bribery nor was it related to the question of appellant's predisposition.

The jury was persuaded into believing that the defendant, Gentile, was engaged in bookmaking and loansharking, by the introduction of testimony that the defendant Gentile was known by the alias "Joe Lane" , that he was "the banker" (82a), that the agent knew his (Gentile's) "routine and operation" (52a) pretty good and knew how he got the payroll checks. (55a, 58a,81a)

The probative value of any other illegal acts are insufficient and must be excluded, as this Court held in United States v. DeCicco, 435 F. 2d 478 (2d Cir. 1970). There, the defendants were convicted of conspiring to transport in interstate commerce, certain works of stolen art.

Evidence was offered to show the defendant's prior involvement in other thefts of art.

This court noted the prejudicial effect of such testimony.

In the present case, a similar prejudicial atmosphere was created by the testimony concerning the payroll checks, which tended to portray defendant Gentile as a confirmed underworld criminal.

This Court held that the evidence of prior crimes was of

relatively little probative value and was

> "far outweighed by the unwarranted inference the jury was permitted to draw that the defendants, at least defendants DeCicco and Gregory Parness were a continuing band of art treasure thieves and 'fencers'."

In the present case, the defendant Gentile had merely raised only the issue of predisposition, but not the issue of intent, by way of his defense of entrapment. In the DeCicco case, these two issues were distinguished and treated separately by the court. Therefore, as in DeCicco, the prejudice to the defendant Gentile outweights the probative value of the evidence concerning his involvement with the payroll checks.

CONCLUSION

The judgments of conviction should be reversed and the indictment dismissed.

Respectfully submitted,

IRWIN KLEIN, P.C.
Attorney for Defendants-Appellants

August 4, 1975

IRWIN KLEIN
(of counsel)

REQUEST NO. A-2

You have heard the testimony that the Internal Revenue Service regulations require the Special Agent to identify himself as such, describe his function and advise the taxpayer of his rights at the initial meeting. Specifically, that taxpayer may remain silent and that anything he says may be used against him, and that he cannot be compelled to incriminate himself by answering any questions or producing any documents and that he has the right to seek the assistance of an attorney before responding. You heard Tsotsos admit that he refused and failed to advise Mr. La Ponzina of such right and that he flouted such regulations. You may consider Tsotsos' conduct in this regard as evidence of overreaching and entrapment as well as lack of credibility. Furthermore, you may also consider Tsotsos' conduct in this regard as a violation of the rights of Mr. La Ponzina as described by the department regulations and exclude any statements or evidence obtained from Mr. La Ponzina as a result of such violation by Tsotsos. If you find that Mr. La Ponzina may have incriminated himself but would not have done so had he been advised of his rights, then you may suppress and disregard any such incriminating testimony.

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Attorney for